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No. 92-127

IN THE

Supreme Court of the United States

October Term, 1992

EQUIBANK AND EQUIMARK CORPORATION,
Petitioners,

vs.

JAMES W. LASH, individually and on behalf of other Equibank employees and former employees similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ELLEN M. DOYLE, ESQUIRE
(Counsel of Record)
MICHAEL P. MALAKOFF, ESQUIRE
MALAKOFF DOYLE & FINBERG, P.C.
Suite 200, The Frick Building
Pittsburgh, Pennsylvania 15219
(412) 281-8400
Counsel for Respondents

Batavia Times Publishing Co.
Harold L. Berkoben
Pittsburgh, Pa. (412) 881-7463

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

WHETHER THE STATE COURT CORRECTLY APPLIED THIS COURT'S PRECEDENTS WHEN IT HELD THAT THERE IS NO ERISA PREEMPTION OF STATE LAW CLAIMS BROUGHT BY EMPLOYEES AGAINST THEIR EMPLOYER, WHERE THE EMPLOYER CONTRACTED WITH ITS EMPLOYEES TO ESTABLISH AN ERISA COVERED ESOP PLAN AS PART OF THEIR COMPENSATION PACKAGE, BUT THE EMPLOYER NEVER ESTABLISHED OR MAINTAINED THE PLAN.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

This action was filed against Petitioners Equibank and Equimark Corporation [hereinafter jointly referred to as "Equibank"] on November 7, 1988 by Respondent, James W. Lash,[1] individually and on behalf of other Equibank employees and former employees ["Lash"]. (Petitioners' Appendix D-1)

[1] James W. Lash died on May 26, 1992. His wife Roberta Lash was named Executrix of his estate on August 4, 1992, and has now exercised her right to be substituted as plaintiff in the action under Rule 2352 of the Pennsylvania Rules of Civil Procedure.

The Complaint stated Equibank promised to establish an employee benefits plan for its employees in return for their continued employment. Equibank promised to use approximately three (3) million shares of Equimark stock to fund an ESOP which would then distribute the shares to employees employed at the calendar year end in 1984, 1985 and 1986. The employees continued to work for the employer, but Equibank's management never established the plan. (D14) Instead, some or all of the stock was used to compensate certain management employees who would not have been entitled to participate in the ESOP. (D16)

The employees sued Equibank and its parent, Equimark Corporation, under Pennsylvania law for their failure to provide the promised plan. The employees could not sue under ERISA because there was no ERISA covered plan for purposes of 29 U.S.C. Section 1132, and they had no right of action under ERISA in light of the fact that they were not participants in an ERISA covered plan. The wrong for which the employees and former employees sued was that the promised plan was never established.

In its Petition, Equibank asserts that Lash's Complaint "refers to alleged wrongs involving three benefit plans (the Pension Plan, the Savings and Retirement Plan and the proposed ESOP)." (Petition p. 5) That assertion is very misleading. The Complaint does refer to two ERISA-covered plans, the Equibank retirement plan, which was terminated in 1984,[2] and the

[2] Equibank has raised in footnote 20 of its Petition alleged facts and arguments never raised at any time in any of the proceedings below. It asserts for the first time in this case, that it could not have received the full $8 million surplus in its pension plan trust until 1990, because the November 30, 1984 plan termination was affected by legislation which occurred after that date. The statutory amendment provisions cited by Equibank, however, do not provide for retroactive application.

Savings and Retirement Plan, which were the subject of certain correspondence to the employees. The Complaint does not assert any claims which in any way relate to those two plans. Significantly, until this Petition, Equibank argued that the claims asserted did *not* relate to these two plans. In Equibank's Brief of Appellants filed in the Pennsylvania Supreme Court, Equibank admitted as to the Retirement Plan, "At no time in this case has Lash alleged that Equibank wrongfully terminated the Retirement Plan, failed to purchase the insurance annuity, or could not lawfully use the approximate $8 million surplus to increase primary capital." (Brief p. 7) Equibank admitted as to the Savings Plan, that "At no time in this case has Lash complained that Equibank failed to establish the enhanced Savings Plus Plan or that Equibank failed to maintain the enhanced plan properly." (Brief p. 9)[3]

The Complaint explicitly asserts state law claims related to the promise to set up and fund an ESOP, which, if it had been set up, established and maintained would have clearly been an ERISA covered benefit plan. However, the Plan was not established or maintained. The basis for Lash's claims is that Equibank promised its employees that in return for their continued employment it would set up and fund an ESOP for their benefit, but Equibank failed to take any of the necessary steps to carry out its express undertaking.

[3] As this example and others demonstrate, Equibank is simply manufacturing arguments to obtain this Court's review without regard to the actual record in this case, even where the arguments contradict the positions it consistently took in the Courts below.

The Superior Court stated:

> No employee benefit plan ever materialized ... Equibank ... failed to take any steps to obtain shareholder or regulatory approval, actions which were necessary to the implementation of any plan. (B3)

Equibank advises this Court in its Petition, that the Superior Court "erroneously concluded that '[b]oth parties agree that there was no plan in existence.' " (Petition p. 5) Equibank's Preliminary Objections, which were filed in the Trial Court, demonstrate that Equibank asserted that there was no plan in existence, that there was only an "idea" or unacted upon "proposal" to provide such a plan. Equibank's Preliminary Objections stated:

> The Information Letter and the other documents referenced by plaintiff clearly state that creation of an ESOP was merely *one of several ideas* that Equibank's management was considering ... (E5) (emphasis added)

Equibank's Preliminary Objections further stated:

> In the exercise of its sound business judgment, Equibank's management decided not to submit the ESOP *proposal* for the necessary shareholder and regulatory approvals ... (E5) (emphasis added)

Equibank also stated:

> [T]he decision not to seek shareholder and regulatory approvals of the ESOP *proposal* was an exercise of Equibank's management's discretion ... (E7) (emphasis added)[4]

[4] In its Brief of Appellees to the Superior Court, Equibank admitted that "it is true that Equibank's management did not submit the ESOP proposal to its shareholders or to regulatory bodies for approval." (Brief p. 32)

Thus, it is disingenuous for Equibank to now assert that the Pennsylvania Superior Court overreached when it held that there was no plan in existence. The non-existence of any ESOP plan was the premise for the filing of Lash's Complaint and served as the keystone of the Superior Court's determination that there was no ERISA preemption.[5] The Superior Court's decision that ERISA does not preempt a claim based on a never-established plan, which was only a contract to form a plan, was eminently correct.

Equibank, at least in a footnote, virtually concedes in this Court that there is no plan currently in existence.

> Petitioners have consistently asserted that if Lash prevails, the result would be the *de facto* establishment and funding of the proposed ESOP. (Petition p. 5, fn. 7)[6]

The Superior Court viewed the relief that would be available to Lash differently then now portrayed by Equibank. It found that if Lash successfully demonstrated a breach of contract by Equibank to its employees to provide the stock plan, that the amount of damages would be measured by the benefit of the bargain, but would not "force the creation of a plan." (B12)

The Superior Court correctly recognized that Lash's claims were for the failure to create a plan, rather than any matter related to an existing plan:

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[5] In the Superior Court Equibank also argued that the state courts had no jurisdiction to determine in the first instance whether an ERISA plan existed for purposes of ERISA preemption. It has now abandoned that completely frivolous argument in its Petition.

[6] In its Brief to the Superior Court (p. 25), Equibank argued that "To fund a plan, obviously the plan must be 'established.' The effect of [Lash's] complaint is to force establishment of any plan once it has been proposed."

> Lash did not bring this action for an enforcement, clarification, or recovery of benefits under an existing plan; section 1132 therefore does not apply here . . . [Lash argues] not that the documents handed out by Equibank were themselves an employee benefit plan, but rather that they constituted a contract to provide such a plan, and that Equibank in failing to create a plan, breached its contract with its employees. (Petition B7)[7]

Because the Superior Court found that there was no employee benefit plan in existence, that Court held that Lash's claims did not implicate the concerns that underlie ERISA's preemption provisions:

> Disposition of the claims made here do not in any way concern the operation, establishment or administration of an employee benefit plan. (B11)

The Pennsylvania Supreme Court affirmed the Pennsylvania Superior Court's determination that because there was no ERISA covered employee benefit plan, Lash's claims challenging Equibank's failure to ever create the plan were not state law claims that related to an employee benefit plan within the meaning of Section 514(a) of ERISA. (A1)

[7] Equibank argued in its Brief to the Superior Court (p. 16) that Lash "has not, and cannot, prove that he is seeking to recover benefits due to him under the terms of a plan, or to enforce his rights under the terms of a plan, or to clarify his rights to future benefits under the terms of a plan."

Equibank has now filed its Petition in which it contends that the Pennsylvania Supreme Court's affirmance of the Superior Court constituted an encroachment into "the sphere of ERISA preemption, resulting in significant adverse effects on benefit plans." (Petition p. 18) The argument section of this Brief will address the errors, false conflicts and misstatements strewn through Equibank's Petition. They represent an attempt to create grounds to review the lower courts' decisions where no grounds exist. This Court need not review the correct decision of the Pennsylvania courts which held that where, as here, there is no ERISA plan in existence, a claim related to the failure to establish such a plan is not a preempted claim.

ARGUMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

1. This Particular Case Does Not Present An Opportunity To Review The Three Purported Areas of Conflict In ERISA Preemption Cases Identified By Equibank.

Equibank has identified three purported areas of conflict among a number of lower courts concerning the scope of ERISA preemption which it asserts can be resolved by review of the facts in this case: 1) "as to whether claim for one-time, lump-sum damage payments, including those measured by reference to a benefit plan, are preempted by ERISA" (Petition p. 9); 2) "as to whether state law claims avoid preemption merely because a plan fiduciary is not a defendant" (Petition p. 10), and 3) "as to whether *Fort Halifax* limits preemption to those cases in which the underlying conduct complained of arises from day-to-day administration of a plan." (Petition p. 11) Not one of these issues is presented in this case.

There is no conflict among any of the cases cited by Equibank as to the sole issue which was adjudicated by the Pennsylvania courts in this case, which is that where there is no plan in existence, there is no ERISA preemption. Courts have uniformly held that as to a plan which is not in existence, there is no ERISA preemption. See, *e.g.*, *Perry v. P*I*E Nationwide Inc.*, 872 F.2d 157 (6th Cir. 1989) (claims related to an employer's conduct prior to the establishment of an ESOP were not preempted by ERISA because preemption required the existence of a plan); *Perkins v. Time Ins. Co.*, 898 F.2d 470 (5th Cir. 1990) (no preemption of a claim related to solicitations made prior to the formation of the plan); and

Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985) (claims related to the prevention of the existence of a plan were not preempted).

Equibank does not even mention the overwhelming authority for the proposition accepted and applied by the courts below that in order for a state law claim to be preempted there must exist an employee benefit plan to which the claim relates. Instead, Equibank attempts, in its Petition, to manufacture conflicts between the decision of the courts below and the decisions of other courts which addressed claims where there were existing employee benefit plans.

a. A Claim The Relief For Which Is Measured By Reference To An Employee Benefit Plan Is Not A Preempted Claim And In This Case There Never Was An Employee Benefit Plan.

Equibank resorts to misstating the facts and misrepresenting the holdings in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992), petition for cert pending (No. 91-1881), *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989), and *Krause v. Dresser Indus., Inc.*, 910 F.2d 674 (10th Cir. 1990), and the decision below of the Pennsylvania Supreme Court (Petition pps. 9-10, fn. 12) in order to support its assertion that there is a conflict between the decisions in those cases and the decision below.

The *Christopher* case did not involve any claim related to an employee benefits plan that never was created or never came into existence. To the contrary, the court stated in finding preemption:

> The complaints here focus on Mobil's amendment of an ERISA governed employee benefit plan and Mobil's disclosure to its employees of the terms of the plan.

Id. at 1218.

While Equibank describes that case as one involving the question of whether a one-time lump-sum damage payment measured by reference to a benefit plan should favor preemption (Petition p. 9, fn. 12), Equibank's description is contrary to how the Court of Appeals for the Fifth Circuit described *Christopher*. It stated that the reason that the claims were preempted was that they required resolution of the terms and administration of the ERISA plan:

> In addition to calculating their damages by computing lost benefits under the plan, a court adjudicating appellants' claims of a fraudulent scheme to reduce the work force would have to examine, at a minimum, the operation of the plan prior to the amendment, the language of the plan amendments, and Mobil's communication to its employees about the terms of the plan amendments.

Id. at 1218.

There was also an *existing* employee benefit plan in *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989). Equibank miscites that case for the proposition that there is preemption "where damages sought were created and measured by plan." (Petition pp. 9-10, fn. 12) The Fifth Circuit's description of the case is completely different. Its preemption holding is based on the premise "that oral agreements or modifications to a pension plan are contrary to the express provisions of ERISA [so that] any oral agreements or modifications relied on by the appellant cannot support his claim for recovery . . ." *Id.* at 1296.

Apparently the District Court in *Krause v. Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir. 1990) (Petition p. 10, fn. 12), did hold that damages for lost pension, health insurance or life insurance benefits were preempted but the Court of Appeals did not affirm that determination

on the merits. Rather, it believed that it could not review that holding because Krause had not filed a cross-appeal of that issue. *Id.* at 680.

Thus, not one of the cases cited by Equibank as conflicting with the decision below involved a set of facts where there was a promise to create a plan, but the plan never came into existence. In contrast, numerous cases have recognized that ERISA itself imposes no obligation to create a plan, so that the question of entitlement to the creation of an employee benefit plan is *not* a subject regulated by ERISA. See *Viggiano v. Shenango China Div. of Anchor Hocking*, 750 F.2d 276, 279 (3d Cir. 1984) ("ERISA's concern is with the elements of a plan and its administration after it has been established rather than to mandate the creation of a program."), and *Moore v. Reynolds Metals Co. Retirement P.*, 740 F.2d 454, 456 (6th Cir. 1984) ("Neither Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide.")

Equibank concedes, as it must, that there are a multitude of cases which have recognized that where the relief sought may be measured with reference to an employee benefit plan, but the claims made do not relate to the plan, there is no preemption. Every circuit court opinion cited by Equibank which considered that question has adopted that principle.

For example, *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990) (Petition p. 9, fn. 12), did not address the issue in this case because the court specifically found that the purchase and maintenance of a group insurance policy for life, accidental death, dismemberment, accident, prescription drug, and comprehensive medical insurance benefits by

an employer constituted the establishment of an ERISA covered plan. *Id.* at 240-242. The court, however, did find that a claim by a medical provider against the plan was not preempted even though the damages would be measured in part by the amount of benefits payable under the plan. *Id.* at 247. *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 (9th Cir. 1986) (Petition p. 9, fn. 12), stands for the proposition that a "make-whole" order of a state administrative agency may require an employer to compensate an employee not only for lost pay but also for other compensation and benefits. *Id.* at 1357-1359. A damage award measurable with reference to an employee benefit plan when not based on a claim related to the employee benefit plan is not preempted.

In *Hospice of Metro Denver v. Group Health Ins.*, 944 F.2d 752 (10th Cir. 1991) (Petition p. 9, fn. 12), there was also no dispute as to the existence of an ERISA covered employee benefit plan. The court found that a claim by a medical provider against the plan was not preempted even though the damages would be based upon the amount of potential plan benefits. *Id.* at 755.

In *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989) (Petition p. 9, fn. 12), the court found that claims relying on an "allegation that the pension plan was modified by informal and unauthorized amendment" were preempted by ERISA, but that claims for wrongful termination "from employment after an alleged oral contract of employment for a term" were not preempted by ERISA. *Id.* at 120. That case supports the Superior Court's determination here that there is a difference between a state law claim for breach of an employment contract and a claim related to an existing employee benefit plan.

Finally, *Klank v. Sears, Roebuck and Co.*, 735 F.Supp. 260 (W.D. Ill. 1990) demonstrates the operation of the principle applied by the Pennsylvania courts below, that an employee does not assert preempted claims with respect to a plan that is not in existence. The court in *Klank* stated that *Klank* complained "that he was misled by Sears' nondisclosure of a future (though then nonexistent) employee benefit plan." *Id.* at 263. The court found that there was a clear "distinction between (1) claiming as an actual beneficiary or participant under an employee benefit plan and (2) claiming as a non beneficiary or non participant whose damages might be measured by the plans' formula." *Id.* at 264.

Therefore, not even one opinion cited by Equibank conflicts with the decisions below holding that a claim for relief based on the failure to establish a plan is not preempted by ERISA because ERISA preemption requires the existence of a plan. Moreover, the cited cases hold that even when there is a plan in existence, a claim which is not related to that plan but which merely seeks damages which may be measurable by the benefits under an ERISA plan is not a claim preempted by Section 514 of ERISA. *A fortiori*, Lash's claims here, which seek damages measured by reference to the amount of benefits under a never established plan are not preempted by Section 514 of ERISA.

b. Since There Was No Plan In Existence, Lash Could Not Bring A Participant's Action Against Any Plan Fiduciary.

Equibank asserts that the Pennsylvania courts erroneously concluded that "ERISA preemption does not apply to a suit against a non-fiduciary." (Petition p. 16) "Contrary to the Pennsylvania Supreme Court's decision . . . ERISA preempts claims that relate to an employee

benefit plan even if the defendant is a non-fiduciary." (Petition p. 17) Equibank's argument once again is a gross distortion of the reasoning of the Superior Court solely to obtain this Court's review. The Superior Court did not hold that there can be no ERISA preemption when a claim is brought against a person who is not a plan fiduciary. The Superior Court simply recognized that since there was no plan in effect, there was no plan fiduciary against whom the action was brought. It correctly considered Lash's claims against the defendants to be based on the past employment relationship rather than under the never established plan. (B11)

This case does not present and the Pennsylvania courts did not decide the issue presented in the cases cited by Equibank, *Gibson v. Prudential Ins. Co. of America*, 915 F.2d 414 (9th Cir. 1990), *Consolidated Beef Indus., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991); and *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987) (Petition pps. 16-17). Lash's claims here were brought against Equibank as his employer, because it failed to provide him with the promised plan. He did not attempt to assert against a non-fiduciary of a plan claims related to the administration of the plan and its treatment of him as a participant in a plan.

In *Gibson v. Prudential Ins. Co. of America, supra*, the plaintiff attempted to bring an action against Prudential which was not a plan fiduciary but was involved in the "initial review and investigation of claims, the initial determination of eligibility for benefits . . . and the calculation and payment of benefits . . ." under the employer's plan, 915 F.2d at 415. The court found that ERISA preempted "claims that relate to an employee

benefit plan even if the defendant is a non-fiduciary." *Id.* at 418. Significantly, the court in *Gibson* distinguished from the facts before it two cases, which the Superior Court relied on (Petition B10-11), for finding no preemption in this case. The *Gibson* court described *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505-06 (9th Cir. 1985), and *Greenblatt v. Buda Co.*, 666 F.Supp. 735, 742 (E.D.Pa. 1987) as involving a claim "that a duty, *unconnected* to the administration of the benefit plan, has been violated." 915 F.2d at 417 fn. 2. Thus, even a casual reading of *Gibson* demonstrates its harmony rather than conflict with the result below.

The issue presented in *Consolidated Beef Industries v. New York Life Ins.*, 949 F.2d 960 (8th Cir. 1991) (Petition p. 17), is also quite different from the issue considered and resolved by the court below. The court in *Consolidated Beef* clearly identified the issue sought to be litigated as "whether the plan was properly administered." *Id.* at 964. The Superior Court clearly identified the issue before it as one which did not involve the administration of any employee benefit plan:

> Lash does not allege the violation of duties created by an employee benefit plan. The conduct which gives rise to his claims here is Equibank's broken promise to create a plan ... Disposition of the claims made here do not in any way concern the operation, establishment or administration of an employee benefit plan. (B11)

For that same reason, the decision in *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987), does not conflict in any respect with the opinion of the courts below. The *Howard* court found that a claim against the Plan administrator was a preempted claim even though the Plan administrator was not a fiduciary under the plan because "[a]llowing plan beneficiaries to assert state

law claims against non-fiduciary plan administrators for the wrongful termination of benefits would upset the uniform regulation of plan benefits intended by Congress." *Id.* at 1565.

It is very clear that the claims asserted herein are not analogous to those in *Gibson*, *Consolidated Beef* and *Howard* which were asserted against a non-fiduciary related to the wrongful administration of an existing employee benefit plan because in this case there never was an employee benefit plan.

c. The Court Below Did Not Premise The Lack Of Preemption Upon A Lack Of A Statutory Remedy For The Wrong Alleged.

Equibank argues that some courts have narrowed the scope of ERISA preemption "to so-called 'core' ERISA concerns." (Petition p. 12) Whether or not Equibank's contention has merit, it has no application in this case. In this case, the lack of ERISA preemption was premised on the non-existence of an employee benefit plan and not any intention to limit the scope of ERISA's preemption to reporting, disclosure and fiduciary matters. The Superior Court recognized that ERISA preemption was very broad in scope. It stated:

> The Supreme Court has held that the phrase "relates to," is to be given broad construction; a law relates to an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. (B9)

The Superior Court also recognized that because there was no plan in existence "[d]isposition of the claims . . . [would] not in any way concern the operation, establishment, or administration of an employee benefit plan." (B11)

Equibank further contends that the courts below encroached on ERISA's broad preemption based on a concern that ERISA preemption would leave the plaintiffs without a remedy. (Petition p. 12) The Superior Court never considered the breadth of ERISA preemption where there is an employee benefit plan and the claims asserted could or would have an impact on that plan. Nor did the Superior Court suggest that it was stretching the limits of ERISA preemption because of the lack of a remedy under ERISA for the wrongs alleged.

Hence, if this Court is interested in addressing the issue of the encroachment on the administration of ERISA plans by decisions permitting state law actions related to those plans to proceed when ERISA does not provide for a remedy, it will not have the opportunity to reach that question in this case. This case turns on the absence of an employee benefit plan, not on the encroachment on ERISA's regulation of such a plan.

2. Equibank Confuses The Question Of What Constitutes A Plan With The Question Of Whether A Plan Is Established Or Maintained.

In its desperation to create a cert-worthy issue in a case which does not present one, Equibank intentionally confuses the determination of whether an employer's policy or practice constitutes an employee benefit plan from the separate determination of whether the employee benefit plan is "established or maintained." Equibank states:

> Lash's Complaint alleged: (1) identifiable intended benefits, $8.1 million worth of stock to be placed in the ESOP; (2) a class of beneficiaries . . . (3) a financing source, the $8.1 million dollar surplus from

> the Pension Plan; and (4) procedures for receiving benefits, a proposed vesting schedule and payment schedule . . . Accordingly, Lash alleged the establishment and/or existence of an ERISA benefit plan . . . (Petition p. 14)

Lash did not allege the establishment and/or existence of an ERISA benefit plan. As found by the lower court, he instead alleged "a contract to form a plan." (B10) In the Complaint, Lash claimed that Equibank's offer was accepted by the employees' continued employment. (D9-10) Equibank asserted that the promise to create an ESOP "was merely one of several ideas that Equibank's management was considering. Such expressions of the management's intentions for the future are insufficient, as a matter of law, to constitute an offer capable of acceptance." (E5) The parties agree that after Equibank made the representations to its employees concerning the ESOP that it never took any steps to actually implement the ESOP.

Nevertheless, in its Petition, Equibank reiterates the argument that it made below, that the fact that the plan which it promised to but did not provide for its employees contained all of the necessary elements for a "plan" is the same as the establishment and maintenance of a plan.

In order to protect employees from employers who establish and maintain plans that do not completely conform to the procedural and reporting requirements provided by ERISA, the courts have uniformly held that a plan which does not satisfy all of ERISA's requirements may still be a plan for purposes of ERISA's enforcement provisions. See, *e.g.*, *Donovan v.*

Dillingham, 688 F.2d 1367, 1372-73 (11th Cir. 1982), and *Scott v. Gulf Oil Corporation*, 754 F.2d 1499, 1501-2 (9th Cir. 1985). (Petition p. 14, fn. 19)[8]

The question resolved by the courts below was a different question. The question was not whether a benefit payment practice, which did not conform to ERISA's disclosure and reporting requirements but which was established and maintained by an employer, constituted an employee benefit plan under ERISA. The question was whether the promised plan ever became a "reality." *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 739 (7th Cir. 1986). The Superior Court correctly concluded that "[n]o employee benefit plan ever materialized." (B3)

If the ESOP which was promised to Equibank's employees had been established, there is no question that it would have been an employee benefit plan for purposes of ERISA. There is no disagreement between the parties or the courts as to the elements of an ERISA plan. But since the promised ESOP never became a "reality", there was no ERISA plan as to which Lash's claim could "relate".

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[8] Other cases cited by Equibank also involved existing benefit payment plans, rather than, as here, a promised plan which never materalized. In *Williams v. Wright*, 927 F.2d 1540, 1543 (11th Cir. 1991) (Petition p. 14, fn. 19), an employee was receiving benefits under an arrangement, which the court concluded constituted an ERISA covered plan. In *Hollingshead v. Burford Equipment Co.*, 747 F.Supp. 1421 (M.D. Ala. 1990) (Petition p. 14, fn. 19), there were board guidelines in effect, and employees had been paid benefits under a service retirement plan. *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449 (5th Cir. 1991) (Petition p. 14, fn. 19), involved the question of whether a group health policy, which was in effect, but had no employer contributions, constituted an employee benefit plan.

Equibank's last straw is to assert that there is "continuing confusion over the appropriate analysis on the 'relate to' issue." (Petition p. 20) It cites three decisions of the courts of appeals in support of that assertion. *Memorial Hosp. Sys. v. Northbrook Ins. Co.*, 904 F.2d 236, 244 (5th Cir. 1990); *Arkansas Blue Cross and Blue Shield v. St. Mary's Hosp., Inc.*, 947 F.2d 1341, 1344-45 (8th Cir. 1991), *cert denied*, 112 S.Ct. 2305 (1992); and *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 145-46 (2d Cir.), *cert denied*, 493 U.S. 811 (1989) (Petition pps. 20-21). Equibank fails to identify what the confusion is that it asserts is reflected in those cases or how that purported confusion can be cleared up by consideration of the issues in this case.

As discussed previously, *Memorial Hosp.* involved an existing plan, and a decision that a claim by a medical care provider against the plan fiduciaries was not preempted. A decision in this case would not clarify whether that case was correctly decided.

In *Ark. Blue Cross & Blue Shield v. St. Mary's Hosp.*, 947 F.2d 1341 (8th Cir. 1991), the court held a state assignment statute preempted when applied to ERISA plans after consideration of "the totality of the statute's impact—negation of a proper plan provision, impact on the relationship of primary ERISA entities, impact on the intrastate and interstate administration of ERISA plans, and economic impact on the plan." *Id.* at 1351. Consideration of those factors supports the decision below, since the decision has no impact on any provision of a plan, on any ERISA entities, on the administration of any ERISA plans or the economic impact on a plan, because there was no plan, no plan participants and no plan fiduciaries.

Finally, in *Aetna*, the court found no preemption of a state escheat law stating "[w]hat triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." 869 F.2d at 146-147. Whether or not that decision was correctly decided will not be resolved if review is granted in this case because in this case it was because there was no plan that there was no effect on any administrative functions or procedures of a plan.

Lash's claims which are based on the non-existence of a plan because of Equibank's breach of promise to establish an ERISA covered plan, are exclusively Pennsylvania common law claims which are not preempted by ERISA and do not implicate any of the purposes of ERISA's preemption provisions. Equibank has not and cannot cite any conflict of authority as to that principle which was the basis of the holding below.

CONCLUSION

It is respectfully submitted that this Court should deny Equibank's petition for a writ of certiorari.

Respectfully submitted,

ELLEN M. DOYLE, ESQUIRE
(*Counsel of Record*)
MICHAEL P. MALAKOFF, ESQUIRE
MALAKOFF DOYLE & FINBERG, P.C.
Suite 200, The Frick Building
Pittsburgh, Pennsylvania 15219
(412) 281-8400
Counsel for Respondents

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